

No. 41904-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Thomas Stephens,

Appellant.

Clallam County Superior Court Cause No. 10-1-00304-4

The Honorable Judge S. Brooke Taylor

Appellant's Reply Brief

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ARGUMENT

I. THE ABSENCE OF A UNANIMITY INSTRUCTION REQUIRES REVERSAL OF THE ASSAULT CONVICTION AND THE DEADLY WEAPON ENHANCEMENT.

The state constitution guarantees the right to a unanimous verdict in a criminal case. Wash. Const. Article I, Section 21; *State v. Elmore*, 155 Wash.2d 758, 771 n. 4, 123 P.3d 72 (2005). If evidence is introduced establishing multiple acts, the court must give a unanimity instruction (unless the prosecution elects a single act on which to proceed). *State v. Coleman*, 159 Wash.2d 509, 511, 150 P.3d 1126 (2007). Failure to do so is presumed to be prejudicial. *Id.* at 512.

In this case, the prosecution alleged that Mr. Stephens assaulted Danielle Stephens with a knife, and introduced evidence relating to four different knives, seized at different times from different locations. *See* RP (1/12/11) 9, 26-27, 80, 93-94; RP (1/13/11) 42-43; CP 24-26 (Exhibit List – referring to knives taken as Exhibits 42, 47, 48); Ex. 11, 22, 35, Supp CP. The prosecution made no attempt to tie any particular knife to the alleged assault, and did not elect a specific knife as the basis for the charge and enhancement.¹ *See* RP (1/13/11) 58-78, 96-104.

¹ In fact, the prosecutor made reference to all four knives in closing. RP (1/13/11) 75, 98.

Under these circumstances, the court should have instructed the jury that all twelve jurors were required to agree on which knife Mr. Stephens allegedly used. *Coleman*, at 511-512. Respondent argues that “[t]here was no error because there was only one knife admitted.” Brief of Respondent, p. 7.

But the prosecutor did not elect Exhibit 42—the knife found in the glove compartment—as the knife allegedly used in the assault. RP (1/13/11) 58-78, 96-104. Instead, the prosecutor made reference to all four knives, without electing any particular knife as the basis for the charge and enhancement. RP (1/13/11) 75, 98. Furthermore, photographs of all four knives were admitted into evidence, and all four knives were handled and discussed in the jury’s presence. Ex. 11, 22, 35; CP 24-26; RP (1/11/11) 29, 39, 68; RP (1/12/11) 6-10, 17, 26-27, 80, 82, 91.

In the absence of a unanimity instruction, the conviction and enhancement violated Mr. Stephens’s state constitutional right to a unanimous jury. *Coleman*, at 511. Accordingly, the assault conviction must be reversed and the enhancement must be vacated. *Id.*

II. BY CLOSING THE COURTROOM, THE TRIAL JUDGE VIOLATED THE REQUIREMENT THAT CRIMINAL TRIALS BE OPEN AND PUBLIC.

Criminal trials must be open to the public. U.S. Const. Amend. I, VI, XIV; Wash. Const. Article I, Sections 10 and 22; *State v. Bone-Club*,

128 Wash.2d 254, 259, 906 P.2d 325 (1995); *Presley v. Georgia*, ___ U.S. ___, ___, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010) (*per curiam*).

Proceedings may only be closed under limited circumstances. *Bone-Club*, at 258-259.

- A. The trial judge violated the constitutional requirement of open and public trials by closing the courtroom and excluding the public to replay a recording for the jury.

Here, the judge closed the courtroom and excluded the public without justification after the jury asked to hear the 911 recording again. CP 34; RP (1/14/11) 2-3. The closure, accomplished without a *Bone-Club* analysis, requires reversal of Mr. Stephens's convictions.

Respondent makes two contradictory arguments regarding the closure. First, Respondent argues that the exclusion of the public was not a closure. Brief of Respondent, pp. 9-13. But the authority cited by Respondent establishes otherwise. Ask Respondent acknowledges, “[t]he [Supreme] Court defined ‘closure’ as ‘when the courtroom is completely and purposefully closed to spectators.’” Brief of Respondent, p. 12 (citing *State v. Lormor*, 172 Wash.2d 85, 93, 257 P.3d 624 (2011)). The rule “applies during trial, and extends to those proceedings that cannot be easily distinguished from the trial itself.” Brief of Respondent, p. 12 (citing *Lormor*, at 93). This definition covers Mr. Stephens's case.

Respondent's second argument admits that the court closed the courtroom,² but contends that the error was not structural, because "[t]he 'structure' of a jury trial does not include open jury deliberations." Brief of Respondent, p. 14. This is nonsensical. The closed courtroom proceeding was not part of jury deliberations. Jury deliberations are closed to everyone (including the judge, counsel, and the parties), not just to the public. The jury did not "deliberate" in the courtroom; had they done so, a new trial would have been required because of the presence of others. *See, e.g., Jones v. Sisters of Providence*, 93 Wash.App. 727, 733, 970 P.2d 371 (1999) (citing *State v. Cuzick*, 85 Wash.2d 146, 150, 530 P.2d 288 (1975)).

The trial court's decision to bring jurors into the courtroom to replay the recording was not improper. Doing so, however, did not require closure of the courtroom. There was no reason to exclude the public while the evidence was replayed.

The closed proceeding violated the Sixth and Fourteenth Amendments, as well as Wash. Const. Article I, Sections 10 and 22 Mr. Stephens's constitutional right to an open and public trial. *Bone-Club, supra*. Accordingly, Mr. Stephens's convictions must be reversed and the

² *See* Brief of Respondent, p. 14 ("[T]here is no question the courtroom was closed.")

case remanded for a new trial. *Id.*

- B. The trial court violated the public trial requirement by holding a hearing in chambers to discuss and answer a jury question.

Respondent fails to address Mr. Stephens's open/public trial argument regarding the court's *in camera* response to a jury question. Brief of Respondent, p. 16-17. The absence of argument on this point may be treated as a concession. *See In re Pullman*, 167 Wash.2d 205, 212 n.4, 218 P.3d 913 (2009). Accordingly, Mr. Stephens's convictions must be reversed and the enhancement vacated. *Bone-Club, supra*.

- C. The Court should reject exceptions to the public trial right that have not been recognized by the Supreme Court.

Mr. Stephens rests on the argument set forth in his Opening Brief.

III. THE TRIAL JUDGE VIOLATED MR. STEPHENS'S CONSTITUTIONAL RIGHT TO BE PRESENT AT ALL CRITICAL STAGES.

The constitution guarantees an accused person in a criminal case the right to be present at all critical stages. *United States v. Gagnon*, 470 U.S. 522, 526, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985); *State v. Pruitt*, 145 Wash.App. 784, 788, 797-799, 187 P.3d 326 (2008). In this case, the court responded to the jury's request to see "the blade of the knife" after consultation with counsel in chambers. CP 33.

Any response to this question was potentially fraught with error. The state produced evidence of four different knives, and the prosecutor did not elect to rely on any particular knife as the one used in the assault. By responding to a question regarding “the knife,” the court risked commenting on the evidence, in violation of Article IV, Section 16. If, as Respondent suggests,³ the court provided the jury Exhibit 42, this would be seen by jurors as confirming the assumption (held by the note’s author, but not necessarily by all jurors) that Exhibit 42 was *the* knife used in the alleged assault, despite the absence of evidence on this point.

The court should not have responded to this question in Mr. Stephens’s absence. The court’s response may well have improperly influenced deliberations. It is immaterial that one knife was admitted into evidence while others were merely handled and discussed in the jury’s presence (and shown in photographs taken by law enforcement). The error here arose when the court responded to a question about *the* knife in the absence of the accused.

The decision to exclude Mr. Stephens from discussions about the jury’s request violated his right to be present. *Gagnon, supra*. His convictions must be reversed and the case remanded for a new trial. *Id.*

³ Brief of Respondent, p. 17.

CONCLUSION

Mr. Stephens's convictions must be reversed and the case remanded for a new trial.

Respectfully submitted on March 1, 2012,

BACKLUND AND MISTRY

A handwritten signature in cursive script that reads "Jodi R. Backlund".

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

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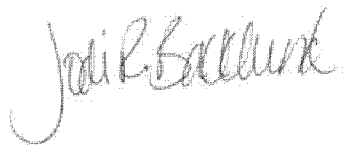
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on March 1, 2012.

A handwritten signature in cursive script, reading "Jodi R. Backlund".

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